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No. 89-1363

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

DARLINA K. FRANCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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In our petition, we explained that the Ninth Circuit erred by not applying the plain terms of Federal Rule of Criminal Procedure 51. That rule provides that an error is preserved only if the party "makes known to the court the action which that party desires the court to take or that party's objection to the action of the court." Nothing in respondent's brief in opposition shows that the Ninth Circuit's decision is correct or too insignificant for this Court's review.

1. Respondent devotes much of her brief (Br. in Opp. 7-12) to her contention that there is an exception from Rule 51 for cases in which an objection would be clearly futile. But that claim, even if true, does not justify the court of appeals' judgment in this case. Respondent acknowledges (Br. in Opp. 12 n.7, 14) that the district courts in the Ninth Circuit were not required before *Gomez* to delegate jury

selection to a magistrate. Such a procedure was permitted, but not mandated. Thus, the litigants were free in the Ninth Circuit to request the district judge to conduct voir dire himself.[1] Hence, respondent should be bound by her decision not to "make[ ] known to the court" (Rule 51) that she would have preferred the district judge to conduct jury selection.[2]

2. Since we filed our petition in this case, the Second Circuit has taken a different approach from the Ninth Circuit on the "futility" question. The tension—if not outright conflict—between the approaches of the two circuits is an additional reason for this Court's review.

In *United States* v. *Musacchia*, No. 88-1491 (2d Cir. Mar. 21, 1990), the defendants did not object to a magistrate's conducting voir dire. Nevertheless, on appeal they argued that this Court's decision in *Gomez* required reversal of their convictions. They argued that they were not required to voice their view to the district court because any objection would have been futile in light of the Second Circuit's decision in *United States* v. *Garcia*, 848 F.2d 1324 (1988), rev'd *sub nom. Gomez* v. *United States*, 109 S. Ct. 2237 (1989). The Second Circuit rejected that argument and affirmed the convictions. The Second Circuit observed that the Ninth Circuit's *France* decision involved an "identical" "factual situation" (slip op. 6823), but the court found the Ninth Circuit's ruling unpersuasive. The Second Circuit noted: "[W]e

[1] In our petition, we described (Pet. 12) a case in Hawaii where the parties persuaded a district judge to conduct jury selection himself.

[2] Respondent mistakenly contends (Br. in Opp. 8 n.5) that our position in this case is inconsistent with our filing in *United States* v. *Mang Sun Wong*, 884 F.2d 1537 (2d Cir. 1989), cert. denied, 110 S. Ct. 1140 (1990). In our brief in opposition in that case, we described the Ninth Circuit's holding in *France* to show that there was no conflict with *Mang Sun Wong*. We most certainly did not argue that the *France* decision was correct.

have not established an exception to the contemporaneous objection requirement in areas where there is a 'solid wall of authority' running contrary to the defendant's objection." *Ibid.* In any event, the Second Circuit held, at the time of the defendants' trial the Supreme Court had not spoken to the issue whether a district court could delegate jury selection to a magistrate. *Id.* at 6824. Thus, the court concluded, an objection was not "necessarily foredoomed." *Ibid.*

We believe that the Second Circuit correctly ruled that the exception for "futility," if any, must be extremely narrow. Thus, such an exception does not apply in a case such as this one where: (1) this Court had not ruled on the issue, and (2) the Ninth Circuit had permitted magistrates to conduct voir dire, but had not mandated that they do so.

3. In our petition, we stated (Pet. 13-16) that this case might give the Court the opportunity to decide whether the district court committed a "plain error" that may be reviewed under Rule 52(b) without a contemporaneous objection. In her brief in opposition, respondent apparently eschews any reliance on the plain-error rule. See Br. in Opp. 14-17. She then contends that this case is unimportant because it does not raise that issue, which has been addressed by several circuits.[3]

We disagree. In the first place, the "futility" issue is not limited to the Ninth Circuit, but will also affect a number of convictions in the Second Circuit. Moreover, the issues presented in this case are of great practical importance. Magistrates routinely conducted voir dire in many districts for years before this Court's decision in *Gomez*. Thus, there

[3] Every circuit to consider the issue has held that a district court's delegation of jury selection to a magistrate was not plain error. See *United States* v. *Musacchia*, *supra*; *United States* v. *Wey*, 895 F.2d 429 (7th Cir. 1990); *United States* v. *Lopez-Pena*, 890 F.2d 490 (1st Cir. 1989) (withdrawn), reh'g granted (Feb. 9, 1990).

are hundreds of convictions that were obtained in cases in which magistrates conducted voir dire. Those cases will be affected by a ruling as to the effect of a defendant's failure to object to the magistrate's role at the time of jury selection. It is undisputed, for example, that the Ninth Circuit's decision in this case may result in the reversal of the convictions of 48 defendants in Hawaii alone. Accordingly, the importance of the issue in this case to the administration of criminal justice calls for this Court's review.

Respondent's decision not to pursue a plain-error argument in this case leads us to modify our position with respect to two related cases in which the plain-error issue is squarely present. We had previously suggested that the Court need not grant certiorari in those cases, *DaSilva* v. *United States*, No. 89-1084, and *Chapoteau* v. *United States*, No. 89-6313,[4] because the plain-error issue was likely to be raised and resolved in this case. Because respondent has abandoned that issue, the Court may wish to grant the petitions in Nos. 89-1084 and 89-6313 in addition to granting the petition in this case.[5] By that action, the Court would be assured of addressing all of the important issues that have arisen in the wake of *Gomez*.

For the foregoing reasons and the reasons stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted. The Court should also grant the petitions in *DaSilva* v. *United States*, No. 89-1084, and *Chapoteau* v. *United States*, No. 89-6313, and set the cases for briefing and argument in tandem.

KENNETH W. STARR
Solicitor General

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[4] Those petitions arise from the same Second Circuit judgment. See 887 F.2d 375 (1989).

[5] We have sent a copy of this brief to counsel for petitioners in Nos. 89-1084 and 89-6313.

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